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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

IVAN SIEWERT,

Petitioner,

v.

TOGO D. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Veterans Administration's statutory duty to assist, as provided in 38 U.S.C. § 5107(a), is only triggered once a veteran has submitted a well-grounded claim.

Whether the Court of Appeals for Veterans Claims' holdings, as affirmed by the Court of Appeals for the Federal Circuit, in *Caluza v. Brown*, 7 Vet.App. 498 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) and *Epps v. Gober*, 126 F.3d 1464 (Fed. Cir. 1997), *cert. denied*, 118 S.Ct. 2348 (1998), misinterpreted 38 U.S.C. 5107(a), by failing to defer to the Agency's interpretation of the statute.

Petitioner respectfully petitions for a writ of certiorari to review this case decided below by the United States Court of Appeals for the Federal Circuit.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review this case decided below by the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Federal Circuit is an unpublished opinion cited as No. 99-7053 (October 21, 1999), 1999 WL 969891 (Fed. Cir.) and reprinted in the Appendix ("App.") at App. 1. The Opinion of the Court of Veterans Appeals for Veterans Claims in *Siewert v. West* is an unpublished opinion cited as No. 97-1705 (November 16, 1998), 1998 WL 813979 (Vet.App.) and reprinted at App. 6.

STATEMENT OF JURISDICTION

The Court has jurisdiction to review this petition with respect to this case, pursuant to 28 U.S.C. § 1254(1). The judgment of the Federal Circuit was entered on October 21, 1999.

PROVISIONS INVOLVED

38 U.S.C. § 5107. Burden of Proof, benefit of the doubt.

(a) Except when otherwise provided by the Secretary in accordance with the provisions of this title, a person who submits a claim for benefits under a law

administered by the Secretary shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Secretary shall assist such a claimant in developing the facts pertinent to the claim. Such assistance shall include requesting information as described in section 5106 of this title.

38 C.F.R. § 3.103 Procedural due process and appellate rights.

(a) Statement of Policy. Every claimant has the right to written notice of the decision made on his or her claim, the right to a hearing, and the right of representation. Proceedings before VA are ex parte in nature, and it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government. The provisions of this section apply to all claims for benefits and relief, and decisions thereon, within the purview of this part 3.

38 C.F.R. § 3.159 Department of Veterans Affairs assistance in developing claims.

(a) Although it is the responsibility of any person filing a claim for a benefit administered by the Department of Affairs to submit evidence sufficient to justify a belief in a fair and impartial mind that the claim is well grounded, the Department of Veterans Affairs shall assist a claimant in developing the facts pertinent to his or her

claim. This requirement to provide assistance shall not be construed as shifting from the claimant to the Department of Veterans Affairs the responsibility to produce necessary evidence.

STATEMENT OF THE CASE

The Petitioner is an Army veteran who served on active duty from January 1963 to January 1966. During the course of his active duty Petitioner was stationed in Germany and while stationed there, was assigned the duty of spraying weeds with a defoliant. The Army did not inform Petitioner of what type or kind of defoliant he was using to spray the weeds, but he believed it was an Agent Orange defoliant. A fellow soldier, who also served in Germany from 1966 to 1967, reported that while stationed in Germany he sprayed weeds with a defoliant, but did not know what chemical was used in the defoliant. In addition, a retired soldier, who was stationed in Germany from 1977 through 1979, reported that during that time, his job was to stop Russian tanks from crossing a certain pass at the Czech-German border and that it was quite obvious that a herbicide defoliant was being used at that pass to control the foliage. The retired soldier stated that he did not know what type of defoliant was being used, but that he was sure that it was very strong since the foliage was killed and did not grow back for a while after being sprayed. The Petitioner has been unable, on his own, to confirm whether the defoliant he was required to use was Agent Orange. Neither the Veterans Administration nor the Department of Defense has

attempted to confirm or deny that Agent Orange Defoliant was used in Germany.

In 1995, the Petitioner was diagnosed with non-Hodgkins lymphoma during a Veterans Administration exam. Consequently, the Veterans Administration initiated a claim for service connection due to Agent Orange exposure on behalf of Petitioner. In January 1996, after determining that Petitioner did not serve in Vietnam, the Regional Office issued a rating decision denying service connection for non-Hodgkin's lymphoma. The Petitioner appealed this decision to the Board of Veterans Appeals.

In May 1997, the Petitioner's dermatologist submitted a letter to the Board of Veterans Appeals stating that pesticides and non-Hodgkin's cutaneous lymphoma were related. The Board of Veterans Appeals determined that the claim for service-connection for non-Hodgkin's lymphoma, on a direct basis, was not well grounded, and without providing any "duty to assist", denied the claim.

At the CAVC, Petitioner argued that the Veterans Administration was required, pursuant to 38 U.S.C. § 5107(a), to invoke their duty to assist him in gaining information as to whether Agent Orange herbicides were used in Germany during the time Petitioner was stationed there.

The CAVC, in affirming the Board of Veterans Appeal's decision, determined that Petitioner failed to submit a well-grounded claim, pursuant to the three requirements set forth in *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) and *Epps v. Gober*, 126 F.3d 1464 (Fed. Cir. 1997), *cert. den.*, 118 S.Ct. 2348 (1998). Specifically, the CAVC failed to

expressly analyze the issue of whether the VA's duty to assist was triggered, since it had already determined that Petitioner has not submitted a well-grounded claim, as a matter of law.

Consequently, the Petitioner appealed to the Court of Appeals for the Federal Circuit ("Federal Circuit"), claiming that pursuant to 38 U.S.C. § 5107(a), the Veterans Administration was required to assist him regardless of whether he had submitted a well-grounded claim pursuant to *Caluza* and *Epps*. Specifically, Petitioner argued that both *Caluza* and *Epps* were misinterpretations of 38 U.S.C. § 5107(a) because the cases failed to defer to the Secretary of Veterans Administration's interpretation of 38 U.S.C. § 5107(a) as found in 38 C.F.R. §§ 3.103(a) and 3.159(a). Specifically, the Petitioner argued that both 38 C.F.R. §§ 3.103(a) and 3.159(a), which were promulgated prior to the Federal Court's holdings in *Epps* and *Caluza*, provided that the Agency's statutory duty to assist was triggered regardless of whether a veteran had submitted a well-grounded claim. As such, Petitioner argued that because neither *Epps* nor *Caluza* deferred to the Secretary's interpretation of 38 U.S.C. § 5107(a) as contained in the regulations, that both *Epps* and *Caluza* constituted misinterpretations of 38 U.S.C. § 5107(a).

The Federal Circuit, in affirming the CAVC's decision determined that it was required to follow its precedential holdings in *Epps* and *Caluza* and therefore held that the Veterans Administration's statutory duty to assist was only triggered once the veterans submitted a well-grounded claim. As such, the Federal Circuit refused to consider whether the holdings in *Epps* and *Caluza*, constituted misinterpretations of 38 U.S.C. § 5107(a) for failing

to defer to the Agency's interpretation of the same as promulgated in 38 C.F.R. §§ 3.103(a) and 3.159(a).

REASONS FOR GRANTING THE WRIT

This case presents the Court with an opportunity to correct a fatal error of statutory interpretation and reaffirm this Court's mandate to reviewing courts of judicial deference to Agency interpretations of statutes under the *Chevron* doctrine. This Court has previously recognized that Congress created a unique system of processing and adjudicating claims for benefits for veterans that are both claimant friendly and non-adversarial. The Federal Circuit recently recognized that the cornerstone of this unique system is 38 U.S.C. § 5107(a), which provides that the "Secretary shall assist such a claimant in developing the facts pertinent to this claim". *Hayre v. West*, 188 F.3d 1327, 1331 (Fed. Cir. 1999). The Federal Circuit further recognized that in "enacting 38 U.S.C. § 5107(a), Congress was codifying the VA's obligation to assist claimants, which had existed in 38 C.F.R. § 3.103(a) since July 18, 1972". *Id.* As such, it is apparent that the Veterans Administration's statutory duty to assist is fundamental to the adjudication of every veteran's claim for disability benefits.

However, the Veterans Administration's statutory duty to assist has been emasculated with the CAVC's holdings, and the Federal Circuit's affirmance of such holdings, in *Epps, supra,* and *Caluza, supra.* Both *Caluza* and *Epps* hold that the Veterans Administration's duty to assist, pursuant to 38 U.S.C. § 5107(a) is not triggered

until a veteran submits a well-grounded claim. The elements of a well-grounded claim have been defined as requiring the submission by the veteran of (1) medical evidence of a current disability, (2) medical, or in certain circumstances, lay evidence of in-service incurrence or aggravation of a disease or injury; and (3) medical evidence of a nexus between the claimed in-service disease or injury and the present disease or injury. *See, Epps*, 126 F.3d at 1468 (Fed. Cir. 1997).

Thus, both *Epps* and *Caluza* hold that the Agency's statutory duty to assist a veteran in developing his claim will not be undertaken until the veteran has in fact presented to the Agency enough evidence to grant a claim without any further development needed by the Veterans Administration. These are judicially created requirements that a claimant must submit evidence to support a well-grounded claim ***or*** suffer summary denial of benefits. Such requirements eliminate the very essence of the uniqueness of the Veterans Administration's duty to assist. Meaning, that in order for a veteran to obtain assistance, he must first do the very thing with which he needs assistance. This inherent dilemma is precisely illustrated in the present case. In the present case, the Veterans Administration determined that Petitioner failed to submit a well-grounded claim because he failed to establish that Agent Orange was used as a defoliant in Germany during the period of time Petitioner served there. This type of evidence is controlled by the Government. The Veterans Administration and not the veteran is in the best possible position to obtain such information. *See, Jensen v. Brown*, 19 F.3d 1413, 1417 (Fed. Cir. 1994). However, the Veterans Administration, pursuant to *Epps* and

Caluza is not required to attempt to obtain this information, pursuant to its duty to assist, until the Petitioner has provided such information to the Agency. The veteran is accordingly caught in a Catch-22 situation in which he can never secure the Agency's assistance ***until*** he submits a well-grounded claim which alleviates the Agency's responsibility to assist the veteran in fully developing the claim.

Independent of the obvious nonsensical result of the *Epps* and *Caluza* holdings, the holdings must nonetheless be set aside by this Court because they constitute a misinterpretation of 38 U.S.C. § 5107(a). As stated *supra*, in providing an interpretation of 38 U.S.C. § 5107(a), neither the *Epps* nor *Caluza* court deferred to the Agency's interpretation of 38 U.S.C. § 5107(a).

A review of the plain language of 38 U.S.C. § 5107(a) establishes that the statute does not explicitly indicate when the Secretary's statutory duty to assist is triggered. As such, the *Epps* and *Caluza* holdings constitute judicial interpretation of the statute. In *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984), this Court held that where "congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such **legislative regulations are given controlling weight** unless they are arbitrary, capricious, or manifestly contrary to statute." (*Emphasis added*). Thus, the *Epps* and *Caluza* panels were required to first determine whether the Agency had interpreted 38 U.S.C. § 5107(a) before attempting to provide their own judicial interpretation of the statute. This principle was recognized by the Federal Circuit in *Hodge v. West*, 155

F.3d 1356 (Fed. Cir. 1998), when the Federal Circuit held, pursuant to *Chevron*, that it was legal error for the CAVC to substitute its own construction of a statute when the Secretary had already provided such a construction through regulatory provisions.

Indeed, the Secretary of the Veterans Administration had already construed the provisions of 38 U.S.C. § 5107(a) through the promulgation of 38 C.F.R. § 3.159(a). 38 C.F.R. § 3.103(a), as cited *supra*, existed prior to the Veterans Judicial Review Act and provided that the Veterans Administration was obligated to assist the veteran in developing the facts pertinent to his claim, without first requiring that the veteran submit a well-grounded claim. It was this regulation that Congress codified in 38 U.S.C. § 5107(a). *See*, 1988 U.S.C.C.A.N. 5782.

Thus, the plain language of 38 C.F.R. § 3.103(a) clearly embodied the uniqueness of the VA's adjudicatory process which provided that the Agency's duty to assist existed ***regardless*** of whether a veteran first submitted a well-grounded claim. The Veterans Administration is now proposing to amend the plain language of the regulation in order to conform to the *Epps* and *Caluza* holdings. The judicial interpretation is now replacing the Agency's interpretation of the statute as found in 38 C.F.R. § 3.159. The Veterans Administration's attempt to amend the regulation to conform to this judicially created law is further evidence of the original language of the regulation as interpreted by the Agency did not require a veteran to first submit a well-grounded claim prior to the Veterans Administration's duty to assist.

The Veterans Administration is currently proposing changes to the regulation that suggest amending the regulation to add the following language "and it is the obligation of the VA to assist a claimant **who has filed a well-grounded claim** in developing the facts pertinent to the claim". *See*, 64 FR 231 (December 2, 1999) (emphasis added). Thus, it is evident, that the Secretary's interpretation of 38 U.S.C. § 5107(a), as promulgated by 38 C.F.R. § 3.103(a), did not require that the veteran submit a well-grounded claim before the Veterans Administration's duty to assist arose.

38 C.F.R. § 3.159, a regulation promulgated by the Secretary prior to the *Epps* and *Caluza* holdings, but after the enactment of 38 U.S.C. § 5107(a), expressly interprets the statute to provide that while a veteran is responsible to submit evidence to support a well-grounded claim, the Secretary is ***still*** required to assist the veteran in submitting such evidence to support the well-grounded claim. The regulation does not restrict the Veterans Administration's duty to assist upon a finding that the veteran has first submitted the well-grounded claim, but rather it is clear that the Secretary intended for the Veterans Administration to assist the veteran in submitting the well-grounded claim.

Once again, this interpretation of 38 C.F.R. § 3.159(a) is evidenced by the Veterans Administration's proposed revisions to 38 C.F.R. § 3.159(a). Specifically, the Veterans Administration proposes completely revising the regulation to add the following specific provision: "(c) VA's duty to help claimants obtain evidence. Upon receipt of any claim, VA will determine whether it is well grounded

before taking any further action." *See*, 64 FR 231 (December 2, 1999) (emphasis added). The proposed revisions further provide that if the VA determines that the claim is well grounded, then the VA's statutory duty to assist is triggered. *Id.*

As such, it is apparent that the Veterans Administration's attempts to revise both 38 C.F.R. §§ 3.103 and 3.159 are an attempt to bring such regulations in conformance with the *Epps* and *Caluza* holdings which failed to defer to the Agency's interpretation. It is Petitioner's contention that pursuant to this Court's holding in *Chevron*, that the regulations should not be amended, but that the *Epps* and *Caluza* holdings should be set aside due to the Secretary's construction of 38 U.S.C. § 5107(a), as provided in the regulations that existed at the time of the *Epps* and *Caluza* holdings. Thus, this Court's intervention at this time is needed to avoid the elimination of the uniqueness of the veterans' adjudicatory process by the amendment of these regulations to conform with the judicial interpretation of § 5107(a) and not the Agency's interpretation.

Pursuant to both 38 C.F.R. §§ 3.103(a) and 3.159(a), the Secretary had spoken on the issue of whether the Veterans Administration's statutory duty to assist was triggered before a veteran submits a well-grounded claim, and the answer was yes. As such, pursuant to *Chevron, supra*, the Federal Circuit and the CAVC were required to defer to the Secretary's interpretation of 38 U.S.C. § 5107(a). Because both *Epps* and *Caluza* failed to provide such deference, they must be struck down by this Court in accordance with its holding in *Chevron*.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals
for the Federal Circuit

99-7053

IVAN C. SIEWERT,

Claimant-Appellant,

v.

TOGO D. WEST, JR., Secretary of Veterans Affairs,

Respondent-Appellee.

DECIDED: October 21, 1999

Before MICHEL, *Circuit Judge*, FRIEDMAN, *Senior Circuit Judge*, and BRYSON, *Circuit Judge*.

PER CURIAM.

Ivan C. Siewert appeals from the decision of the Court of Veterans Appeals (subsequently renamed the Court of Appeals for Veterans Claims) affirming the denial of Mr. Siewert's request for service connection for non-Hodgkin's lymphoma. We *affirm*.

I

Mr. Siewert served on active duty in the United States Army between 1963 and 1966. In 1995, he was

diagnosed with non-Hodgkin's lymphoma. As a result of the diagnosis, the Department of Veterans Affairs (DVA) initiated a claim for service-connected disability compensation on Mr. Siewert's behalf. Mr. Siewert subsequently submitted a statement claiming that, while stationed in Germany during his active duty, he had been assigned the task of spraying weeds with a defoliant. He stated that he was not told what chemical he had been given to spray the weeds, but that he believed it to be Agent Orange. He further asserted that he believed in-service exposure to Agent Orange caused his non-Hodgkin's lymphoma.

In January 1996, the DVA denied Mr. Siewert's claim on the ground that his disease was not shown to be service connected. Mr. Siewert appealed to the Board of Veterans' Appeals. As part of his appeal, he submitted a letter from his dermatologist stating in part that "pesticides and non-Hodgkin's . . . lymphoma have been related[.]" Attached to the letter were abstracts from various medical studies, some of which suggested a connection between pesticide exposure and certain cancers, including non-Hodgkin's lymphoma. The Board determined that Mr. Siewert's claim for service connection was not well grounded because, among other reasons, he offered no competent medical evidence to show that his non-Hodgkin's lymphoma resulted from exposure to herbicides or Agent Orange. On appeal, the Court of Veterans Appeals found that Mr. Siewert had failed to present a well-grounded claim and affirmed the Board's decision.

II

In his brief on appeal to this court, Mr. Siewert argues that the DVA had a statutory duty to assist him pursuant to 38 U.S.C. § 5107(a) regardless of whether his claim was well grounded when he submitted it. There are two problems with this argument. First, as he recognizes, it is contrary to this court's decision in *Epps* v. *Gober*, 126 F.3d 1464, 1469 (Fed.Cir.1997). He urges that *Epps* was incorrectly decided and should not be followed in this case. As a panel, however, we are required to follow prior precedents of this court; only the en banc court may overturn this court's own governing precedents.

Second, Mr. Siewert did not raise before the Court of Veterans Appeals the section 5107(a) argument that is featured in his brief in this court. In the Court of Veterans Appeals, he argued that his claim was well grounded and that because he had set forth a plausible claim, the DVA was required to assist him in obtaining information to support his claim. In his brief to the Court of Veterans Appeals, Mr. Siewert argued only the factual issue of whether he had submitted a well-grounded claim. Specifically, he asserted that he was exposed to Agent Orange during his period of active duty and that his exposure to Agent Orange caused his disease. Mr. Siewert characterized the sole issue in the case as "[w]hether the Appellant's claim[ ] for entitlement to service connection for non-Hodgkin's lymphoma is well-grounded." He then argued that he had "clearly met the burden of asserting a plausible claim and that the information he has provided should prompt the VA to invoke their duty to assist the veteran in gaining information about the use of such

herbicides in Germany, and fully support and assist him in his effort to substantiate his claim."

Nowhere in his brief to the Court of Veterans Appeals did Mr. Siewert raise the argument that he presses on appeal: that the section 5107(a) duty to assist applies without regard to whether the veteran has established a well-grounded claim. This court has held that it will not consider legal arguments that were not raised in or decided by the Court of Veterans Appeals. *See Boggs* v. *West*, No. 99-7003 (Fed.Cir.1999).

This court's decision in *Linville* v. *West*, 165 F.3d 1382 (Fed.Cir.1999), which Mr. Siewert cites in his reply brief, does not help him. In that case, the claimant raised an issue before the Court of Veterans Appeals, but that court did not explicitly address it. We held that the issue raised before the Court of Veterans Appeals was properly before us even though it was not discussed in the court's opinion. In this case, by contrast, Mr. Siewert seeks to present to us an issue that he did not raise at all before the Court of Veterans Appeals. For that reason, this case is governed by Boggs, not Linville.

In oral argument, Mr. Siewert's-counsel made the related but different contention that this court in *Epps* and the Court of Veterans Appeals in *Caluza* v. *Brown*, 7 Vet.App. 498 (1995), aff'd, 78 F.3d 604 (Fed.Cir.1996) (table), adopted an unduly stringent standard for determining whether a claimant has established a well-grounded claim. As a consequence, he argued, claimants such as Mr. Siewert are being denied their statutory entitlement to assistance in developing their claims.

We do not permit counsel to raise at oral argument an issue not presented in the brief on appeal. *See Henry* v. *Department of Justice*, 157 F.3d 863, 864 (Fed.Cir.1998); *MB Assocs.* v. *United States*, 222 Ct.Cl. 493, 495-96 (1979). One passage of Mr. Siewert's brief, however, adverts in passing to the issue of the standard for defining well-groundedness ("This error was compounded when the *Epps* panel adopted the definition of well groundedness [set forth in Caluza]."). Although that reference to the question of the proper definition of well-groundedness is terse, we deem it sufficient to raise the issue for appellate review, particularly in light of counsel's elaboration on the point at oral argument. On the merits of the definitional issue, however, Mr. Siewert's argument is foreclosed by this court's decision in *Epps*, in which this court adopted the standard for establishing a well-grounded claim that the Court of Veterans Appeals outlined in Caluza. *See Epps*, 126 F.3d at 1468. We therefore affirm the disposition of the Court of Veterans Appeals on the authority of *Epps*.

Designated for electronic publication only

UNITED STATES COURT OF VETERANS APPEALS

No. 97-1705

IVAN C. SIEWERT, APPELLANT,

V.

TOGO D. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before GREENE, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 28(i), this action may not be cited as precedent.

GREENE, *Judge*: Ivan C. Siewert appeals a July 1997 Board of Veterans' Appeals (Board) decision denying service connection for non-Hodgkin's lymphoma. The Secretary has filed a motion for summary affirmance. The Court has jurisdiction of the case under 38 U.S.C. § 7252(a). Summary disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will grant the Secretary's motion and affirm the decision of the Board.

I. FACTS

The appellant served on active duty in the U.S. Army from January 1963 to January 1966. Record (R.) at 106. He had overseas service in Germany. He did not serve in Vietnam. His service medical records reveal no ailments relevant to this claim. In August 1994, he applied for service connection for blood poisoning that resulted from an infection in his right index finger for which he was

treated in 1972 at a hospital in Ft. Knox, Kentucky. R. at 39-43. Apparently, this claim was denied. R. at 45. However, during a compensation and pension examination in April 1995, Dr. Mona Mubarak noted in the appellant's history that he had an infected right index finger in 1963 with no further problems. R. at 48-49. She also diagnosed the appellant as having cutaneous T-cell non-Hodgkin's lymphoma and noted that his lesions had been biopsied in 1993 or 1994 by another physician as mycosis fungoides. *Id.* Mycosis fungoides is a form of lymphoma characterized by chronic red, scaly irregular dermatitis. WEBSTER'S MEDICAL DESK DICTIONARY 458 (1986). As a result, VA initiated a claim for service connection due to Agent Orange exposure on behalf of the appellant.

In July 1995, the appellant received a deferred rating decision pending information from the Army on whether the appellant had served in Vietnam. R. at 62. In September 1995, after learning a claim had been filed on his behalf, he submitted a statement claiming that while stationed in Germany, one of his duties was to spray weeds with a defoliant. Also, he stated that while on duty near the border between Czechoslovakia and Germany, weeds were similarly sprayed with a defoliant. R. at 71-72. He stated that he was not told what he was using to spray the weeds, but that he believed it was Agent Orange. *Id.* He also provided a statement from a fellow soldier who also served in Germany from 1966 to 1967 that contained substantially the same information. R. at 74. The appellant's service records confirmed that he had no service in Vietnam. R. at 77. A January 1996 rating decision denied service connection for non-Hodgkin's lymphoma. R. at 84-85. The appellant filed a Notice of Disagreement

(NOD) (R. at 89), and the regional office (RO) issued a Statement of the Case (SOC) (R. at 91-99). He appealed to the Board. R. at 101-02. Another soldier, who served in Germany from 1977 to 1979, submitted a statement in support of the appellant's claim stating that he believed a defoliant was used along the border between Czechoslovakia and Germany. R. at 112. The statement did not identify the defoliant. A supplemental SOC was issued. R. at 115-17.

In May 1997, Dr. Larry Seitz, the appellant's dermatologist, provided a letter stating that "[I]t is clear that pesticides and non-Hodgkin's cutaneous lymphoma have been related and I think that this association is well documented." R. at 151. Attached to his letter were abstracts from various studies conducted between 1992 and 1996, some of which suggest a connection between pesticide exposure and certain cancers, including non-Hodgkin's lymphoma. R. at 152-66. The Board determined that the claim for service connection for non-Hodgkin's lymphoma on a direct basis was not well grounded and that the appellant had no legal entitlement to service connection on the basis of presumptive exposure to Agent Orange under applicable statutes and regulations. This appeal followed.

II. APPLICABLE LAW AND ANALYSIS

A person filing a claim for VA benefits has "the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded." 38 U.S.C. § 5107(a); *see Carbino v. Gober*, 10 Vet.App. 507, 509 (1997). The determination of whether a

claim is well grounded is a matter of law that this Court reviews de novo. *See* 38 U.S.C. § 7261(a)(1); *Robinette v. Brown*, 8 Vet.App. 69, 74 (1995). The Court has held that to be well grounded, a claim must be accompanied by supportive evidence and that such evidence "must 'justify a belief by a fair and impartial individual' that the claim is plausible." *Tirpak v. Derwinski*, 2 Vet.App. 609, 611 (1992) (quoting 38 U.S.C. § 5107(a)). A well-grounded claim generally requires (1) medical evidence (diagnosis) of a current disability; (2) medical or, in certain circumstances, lay evidence of incurrence or aggravation of a disease or injury in service; and (3) medical evidence of a nexus between an in-service injury or disease and the current disability. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed.Cir.1996) (table); *see also Epps v. Gober*, 126 F.3d 1464, 1468 (Fed.Cir.1997), *cert. denied*, 118 S.Ct. 2348 (1998) (expressly adopting the definition of a well-grounded claim set forth in *Caluza, supra*).

A service-connection claim must be supported by evidence of a nexus between a claimed in-service disease or injury and the present disability. *See Caluza, supra.* Where the determinative issue involves medical causation, competent medical evidence is required to establish this nexus. *See Grivois v. Brown*, 6 Vet.App. 136 (1994). This burden may not be met by presenting lay testimony. Lay persons are not competent to offer medical opinions. *See Ruiz v. Gober*, 10 Vet.App. 352, 356 (1997); *Grivois, supra.* However, under certain circumstances service connection may be established presumptively under 38 U.S.C. § 1116. This statute creates a presumption that

certain diseases that manifest themselves within prescribed periods are related to service. *See Brock v. Brown*, 10 Vet.App. 155, 160 (1997). The VA regulation implementing 38 U.S.C. § 1116 provides:

> A veteran who . . . served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975 and has a disease listed at § 3.309(e) shall be presumed to have been exposed during such service to an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service.

38 C.F.R. § 3.307(a)(6)(iii) (1997).

Non-Hodgkin's lymphoma is a disease listed at section 3.309(e), which is presumed to have resulted from Agent Orange exposure. *See* 38 U.S.C. § 1116; 38 C.F.R. § 3.309(e) (1997). Here, the appellant did not serve in Vietnam during the presumed period for exposure to a herbicide agent. *See* 38 U.S.C. § 1116; 38 C.F.R. §§ 3.307(6)(iii), 3.309(e). Therefore, by the plain language of the regulation, he is not permitted to avail himself of the presumption of service connection for his disease.

Although a particular disease is not listed as presumptively service connected, the appellant can still establish service connection with evidence of direct causation. *See* 38 U.S.C. § 1113(b); *Combee v. Brown*, 34 F.3d 1039, 1043-44 (Fed.Cir.1994) (holding that service connection for an unlisted condition can be pursued under the general VA compensation entitlement system). The evidence of record fails to establish direct causation. *See* Caluza, 7 Vet.App. at 504-05. The appellant has failed to provide evidence that he was exposed to Agent Orange

or any other herbicide; that he had any in-service incurrence of non-Hodgkin's lymphoma; or that there is any evidence linking his current disability to his service. The affidavits from other servicemen were insufficient to show exposure to Agent Orange. Further, Dr. Seitz's statement fails to provide any medical evidence that the appellant's current disease is service connected. Although Dr. Seitz's May 1997 letter proposes a relationship between non-Hodgkin's lymphoma and exposure to pesticides, there is neither evidence nor an allegation that the appellant was exposed to pesticides. Thus, he has failed to meet the second and third *Caluza* requirements.

Accordingly, the Court holds, upon de novo review, that the appellant's claim is not well grounded.

III. CONCLUSION

After consideration of the pleadings and a review of the record, the Court holds that the appellant has not demonstrated that the Board committed either legal or factual error that would warrant reversal or remand. The Court is also satisfied that the Board decision fulfills the "reasons or bases" requirements of 38 U.S.C. § 7104(d)(1). *See Gilbert v. Derwinski*, 1 Vet.App. 49 (1990).

The Secretary's motion is granted. The decision of the Board is AFFIRMED.

DATED: NOV 16 1998

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United States Court of Appeals for the Federal Circuit

ORDER

A petition for rehearing en banc having been filed by the APPELLANT, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service.

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on December 15, 1999.

FOR THE COURT,

/s/ Jan Horbaly (AV)
Jan Horbaly
Clerk

(Filed Dec. 8, 1999)

Dated: December 8, 1999

cc: KENNETH M. CARPENTER
ELIZABETH W. NEWSOM

SIEWERT V DVA, 99-7053
(CVA – 97-1705)

***

99-7053

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

IVAN C. SIEWERT
Claimant-Appellant,

v.

TOGO G. WEST, JR.,
Secretary of Veteran Affairs,
Respondent-Appellee.

APPEAL FROM UNITED STATES
COURT OF APPEALS FOR
VETERANS CLAIMS IN 97-1705
JUDGE WILLIAM P. GREENE, JR.

APPELLANT'S PETITION FOR REHEARING EN BANC AND ADDENDUM

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November 11, 1999

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rules 28(a)(1) and 47.4, counsel for Claimant-Appellant Ivan C. Siewert certifies the following:

1. The full name of every party or amicus represented by me is:

   Ivan C. Siewert

2. The name of the real party in interest represented by me is:

   None

3. The parent companies, subsidiaries and affiliates that have issued shares to the public, of the party or amicus curiae represented by me are:

   None.

4. The name of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court of agency or are expected to appear in this Court are:

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STATEMENT OF COUNSEL

Based on my professional judgment, I believe this appeal requires rehearing en banc in order to consider whether the CAVC has adopted an unduly stringent standard for determining whether a claimant has established a well-grounded claim. The Panel in this case was unable to reach the merits of the definitional issue because such argument was foreclosed by this court's decision in *Epps*, which adopted the standard for establishing a well-grounded claim that the Court of Veterans Appeals outlined in *Caluza*. *See Epps*, 126 F.3d at 1468. The precedents established in *Caluza* and in *Epps*, in the judgment of Appellant's counsel, create an unreasonably high standard for the submission of a "Plausible claim" to constitute a well-grounded claim.

/s/ Kenneth M. Carpenter
Kenneth M. Carpenter,
Attorneys for Appellant,
Ivan C. Siewert

99-7053

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

IVAN C. SIEWERT,
Claimant-Appellant,

v.

TOGO G. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS,
Resondent-Appellee.

APPELLANT'S PETITION FOR REHEARING EN BANC

Pursuant to Rule 35(d) of the Federal Rules of Appellate Procedure and the Federal Circuit Rules, Ivan C. Siewert respectfully moves for a rehearing en banc of the October 21, 1999 decision of the Court affirming the U.S. Court Of Claims for Veteran Appeals ("CAVC") in the case of *Siewert v. West*, No. 97-1705 (Vet.App.).

POINTS OF LAW TO BE CONSIDERED

Appellant respectfully submits that the CAVC's definition in *Caluza v. Brown*, 7 Vet.App. 498 (1995), *aff'd*, 78 F.3d 604 (Fed.Cir.1996) (table) of a well-grounded claim, which was adopted by this Court in *Epps*, unreasonably exceeds the "plausible basis" requirements to well-ground a claim. The Appellant contends that the *Caluza/Epps* definition is too stringent a criteria to support the *de minimis* evidence required to "well ground" a claim. This Court in *Epps*, interpreted 38 U.S.C. § 5107(a) as requiring a veteran to submit a well-grounded claim in order to trigger the duty to assist.

In arriving at that holding, the Panel in *Epps* tangentially referred to, and adopted as reasonable, the definition of a well-grounded claim previously articulated by the CAVC in *Caluza*. In doing so, this Court inadvertently endorsed a definitional criteria for the submission of a well-grounded claim which is unduly stringent and is inconsistent with the plain language of 38 U.S.C. § 5107(a).

ARGUMENT

Pursuant to 38 U.S.C. § 5107(a), "a person who submits a claim for benefits under a law administered by the Secretary shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded." Once the veteran brings a sufficiently well-grounded claim, the VA has an obligation to assist the claimant "in developing the facts pertinent to the claim." 38 U.S.C. § 5107(a).

The CAVC, in *Murphy v. Deerwinski*, 1 Vet.App. 78 (1990), defined a well-grounded claim as "a plausible claim, one which is meritorious on its own or capable of substantiation. Such a claim ***need not be conclusive*** but only possible to satisfy the initial burden of § 5107(a)." (Emphasis added.) *See also Robinette v. Brown*, 8 Vet.App. 69, 74 (1995). Accordingly, the CAVC held in *Murphy* that a well-grounded claim need not be meritorious, but only sufficient to show that there is a reasonable possibility that the veteran is entitled to benefits. *Murphy*, at 81.

The fundamental question in almost every claim for service connected disability benefits is whether a connection exists between the veteran's claimed disability and

an in-service injury or disease. Therefore, under *Murphy*, a well-grounded claim must be a claim in which such a connection would appear plausible to an impartial individual or from an objective point of view. However, the CAVC in *Murphy* was also careful to make the distinction between a claim which is meritorious on its own, meaning that no further development of the evidence is necessary, and a claim which is merely capable of substantiation because further evidence is needed before benefits can be awarded. In *Murphy*, the CAVC held that, if the BVA had concluded that there was no evidence of a causal relationship between the veteran's disability and the in-service incurrence, then the veteran's claim was nevertheless well-grounded, because it was for the Agency to develop the evidence pertinent to the question of whether there was actually a connection between the veteran's disability and service. *Murphy*, 1 Vet.App. at 82.

Thereafter, the CAVC in an apparently conflicting holding with *Murphy*, held in *Grottveit v. Brown*, 5 Vet.App. 91 (1993), that "lay assertions of medical causation cannot constitute evidence to render a claim well grounded under § 5107(a); if no cognizable evidence is submitted to support a claim, the claim cannot be well grounded." *Grotveit*, 5 Vet.App. at 93. Although the panel in *Grottveit* cited to the CAVC's prior holding in *Murphy*, by acknowledging the required plausibility of a well-grounded claim, it otherwise neglected to reconcile the two cases. In superimposing this evidentiary requirement onto a well-grounded claim, the Court stated: "Just as the BVA must point to a medical basis other than its own unsubstantiated opinion, *Colvin v. Derwinski*, 1 Vet.App. 171, 175 (1991), appellant cannot meet his initial burden

by relying upon his own, his representative's or his daughter's opinions as to medical matters." *Grottveit*, 5 Vet.App. at 93. Appellant feels that it is important to point out that the effect of the CAVC's holding in *Grottveit* was to improperly shift the burden which by law was placed upon the Agency to develop the veteran's claim, to the veteran to submit a fully "meritorious" claim rather than submit a merely "plausible" claim, prior to triggering the duty to assist. A genuine conflict was created by *Grottveit* when it placed a far greater burden upon the veteran than the one contemplated by 38 U.S.C. § 5107(a), to submit merely a well-grounded claim. Without resolving the conflicting definitions, which the CAVC case law contained for a well-grounded claim, created by this Court's holdings in *Murphy* and *Grottveit*, the holding in *Grottveit*, was later expanded by the CAVC in its *Caluza* and *Epps* decisions which were further incorporated into the CAVC's definition of a well-grounded claim. *See Caluza*, 7 Vet.App. at 506; *Epps*, 9 Vet.App. at 343-44.

Ironically, the current definition of a well-grounded claim adopts the relevant language of *Murphy*, stating that "[a] well-grounded claim is 'a plausible claim, one which is meritorious on its own or capable of substantiation. Such a claim need not be conclusive but only possible to satisfy the initial burden of § 5107(a).' [Citing *Murphy*, 1 Vet.App. at 81.]" *Epps*, 9 Vet.App. at 343. However, the definition has been significantly expanded to require that "there must be (1) a medical diagnosis of a current disability; (2) medical, or in certain circumstances, lay evidence of an in-service occurrence or aggravation of a disease or injury; and (3) medical evidence of

a nexus between an in-service injury or disease and the current disability." *Epps*, 9 Vet.App. at 343-44.

As a consequence, the CAVC's case law has created an expansive definition of a well-grounded claim, pursuant to 38 U.S.C. § 5107(a), while having never actually resolved the inherent conflict between its holding in *Murphy* and its later holdings in *Grottveit*, *Galuza*, and *Epps*. This problem for the veteran was compounded when this Court in a parenthetical reference in the *Epps* opinion adopted the definition of a well-grounded claim setout in *Caluza*.

It is significant to note that the CAVC in *Robinette*, *supra*, a case which was decided just three months after *Caluza*, the CAVC reiterated the substance of its prior holding in *Murphy*, and stated, in pertinent part:

> [T]o be well grounded a claim ***need not be supported by evidence sufficient for the claim to be granted***. Rather, ***the law establishes only a preliminary threshold of plausibility with enough of an evidentiary basis to show that the claim is capable of substantiation*** (if it is not meritorious when initially presented). ***A vital element of such substantiation is the execution of the Secretary's duty to assist a claimant once a well-grounded claim has been filed under § 38 U.S.C. 5107(a). . . . The threshold of plausibility to make a claim well grounded "is rather low", White [v. Derwinski]***, 1 Vet.App. [519, 521 (1991)] . . . ***the evidentiary threshold to make a claim well grounded does not require that the evidence in the record show a reasonable possibility of success on the merits, because the duty to assist has yet to be executed***. Such a prior, final merits denial should be understood in the

> context of the unique evidentiary burdens in the VA adjudication system that permit a merits disallowance only where the evidence preponderates against the claim. *See Gilbert*, 1 Vet.App. at 54 (construing 38 U.S.C. § 5107(b)). (Emphasis added.) *Robinette*, 8 Vet.App. at 75-77.

The contradiction between the CAVC's definition of a well-grounded claim as setout in *Murphy* as being merely a plausible claim, and the CAVC's expansive definition in *Grottveit, Caluza* and *Epps*, that the submission of a well-grounded claim requires proof of medical nexus, is well illustrated by the CAVC's holding in *Robinette*. In *Robinette*, the question before the CAVC was whether a lay statement by a veteran about what a physician told him regarding the medical etiology of his current diagnosis constituted sufficient medical evidence for purposes of well-groundedness. *Robinette*, 8 Vet.App. at 77. In that case, the veteran's statement would have clearly been "**capable of substantiation**" simply by seeking confirmation from the physician of the veterans allegation. However, the CAVC found that because the evidence did not constitute what the CAVC considered to be "medical evidence", under *Grottveit*, it was not sufficient to well-ground the veteran's claim. *Robinette*, 8 Vet.App. at 77. Therefore, although the CAVC clearly believed that its prior precedent in *Murphy* remained intact, it instead chose to follow its later *Grottveit/Caluza/Epps* precedent when it required the veteran to file a claim which was fully meritorious on its own, rather than a claim which was ***either*** meritorious on its own, ***or*** capable of substantiation.

Appellant respectfully asks that this Court to reconsider its holding in *Epps* on the basis that the adoption of the *Caluza* definition of a well-grounded claim conflicts with the CAVS's definition of a well-grounded claim as merely a "plausible claim" as provided in *Murphy*, and with the plain language of 38 U.S.C. § 5107(a). The definition of a well-grounded claim as setout in *Grottveit*, *Caluza* and *Epps* misinterprets § 5107(a) and is simply too stringent in the requirements imposed upon the veteran in what is required to be submitted in support of a well-grounded claim. The Appellant urges this Court to reconsider that portion of the *Epps* decision and issue and en banc decision which clearly reflect that a well-grounded claim is merely a "plausible claim" as setout in the CAVC's decision in *Murphy* because that definition is more consistent with an interpretation of 38 U.S.C. § 5107(a) than the definition of a well-grounded claim as setout in *Grottveit*, Caluza and *Epps*, and the *Murphy* definition is more consistent with the underlying statutory scheme of veterans benefits.

In *Brown v. Gardner*, 513 U.S. 115, 117-18, 115 S.Ct. 552, 555, 130 L.Ed.2d 462 (1994), the United States Supreme Court held that, in the context of veterans benefits, any interpretive doubt is to be resolved in favor of the veteran.

> The ultimate objective when interpreting a statute is to give effect to the intent of Congress. [Citation omitted.] Our duty is "to find that interpretation which can most fairly be said to be embedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." *National Labor Review Bd. v. Lion Oil Co.*, 352 U.S.

> 282, 297, 77 S.Ct. 330, 338, 1 L.E.2d 331 (1957). In discharging that duty, [the Court] looks] not only to the relevant statutory language, but to the design of the statute as a whole and to its object and policy. *See Crangon v. United States*, 494 U.S. 152, 157, 110 S.Ct. 997, 1001, 108 L.Ed.2d 132 (1990). *Spencer v. Brown*, 17 F.3d 368, 372 (Fed. Cir. 1994).

Appellant asserts that the CAVC properly defined a well-grounded claim pursuant to 38 U.S.C. § 5107(a), as a plausible claim in *Murphy*, and that the CAVC's later interpretation of 38 U.S.C. § 5107(a) in *Grottveit*, *Caluza* and *Epps*, requires a veteran to bring, not just a plausible claim, but now a fully **meritorious** claim before triggering the duty to assist. The deletion of the "capable of substantiation" element found in *Murphy*, undermines and misinterprets 38 U.S.C. § 5107(a). Appellant argues that requiring a veteran to produce medical evidence to show the medical nexus between a current disability and an in-service disease or injury, imposes a burden upon the veteran to bring, not just a *plausible* claim, but a fully *substantiated*, and therefore a *conclusive* claim for benefits. Such a burden is not only inconsistent with this CAVC's earlier precedent in *Murphy*, but otherwise contrary to the underlying statutory scheme of adjudicating claims for veterans benefits.

In the House Report of the VJRA regarding the adjudication of claims for veterans benefits, it was anticipated that the majority of veteran's filing claims would be doing so without the benefit of legal assistance or representation. 1988 U.S.C.C.A.N. at 5794. It was therefore vital that veterans claims be adjudicated in a paternalistic, non-adversarial, and pro-claimant manner and that

"[i]n such a beneficial structure, there is no room for such adversarial concepts as cross-examination, best evidence rule, hearsay evidence exclusion, or ***strict adherence to burden of proof***." (Emphasis added.) 1988 U.S.C.C.A.N. at 5795. The CAVC's present use of the Gottveit, *Caluza*, and *Epps* definition of a well-grounded claim misinterprets 38 U.S.C. § 5107(a) by effectively shifting the burden of collection and developing medical nexus evidence from the Agency to the veteran. This is the exact opposite of the intent of Congress.

Accordingly, Congress stated that "[a]fter a claim is filed, the agency helps the claimant compile evidence to support his or her claim." 1988 U.S.C.C.A.N. at 5975. This obligation on the part of the Agency was previously contained in 38 C.F.R. § 3.103(a) and later codified in 38 U.S.C. § 5107(a). Consequently, in sharp contrast to most other entitlement programs, in the veterans benefits system, it is the Agency which bears the burden of developing the evidence pertinent to a veteran's claim, not the veteran. In *Hayre v. West*, 188 F.3d 1327, 1331 (Fed.Cir.1999), the Federal Circuit stated:

> Congressional mandate requires that the VA operate a unique system of processing and adjudicating claims for benefits that is both claimant friendly and non-adversarial. An integral part of this system is embodied in the VA's duty to assist the veteran in developing facts pertinent to his or her claim. *See Little v. Derwinski*, 1 Vet.App. 90, 91 (1990). **The cornerstone of the veterans' claims process is 38 U.S.C. § 5107(a)**, which was enacted in 1988 (formerly § 3007(a)) when it was added by the Veterans' Judicial Review Act, Pub.L. No. 100-687, § 103(a), 102

> Stat. 4105, 4106 (1988) ("The Secretary shall assist such a claimant in developing the facts pertinent to the claim."). *See id.* In enacting 38 U.S.C. § 5107(a), Congress was codifying the VA's obligation to assist claimants, which had existed in 38 C.F.R. § 3.103(a) since July 18, 1972. *See* 38 C.F.R. § 3.103(a) (1987) ("It is the obligation of the VA] to assist a claimant in developing the facts pertinent to his [or her] claim. . . . "). (Emphasis supplied)

Placing an initial burden beyond "plausibility" upon the veteran's shoulders improperly shifts the burden to the veteran to provide medical evidence of not only the veteran's claimed disability, but medical evidence of the nexus between that disability and an in service injury or disease, the CAVC has imposed the very burden of proof upon the veteran which Congress specifically sought to eliminate. Moreover, the imposition of such a burden on the veteran renders meaningless the VA's duty to assist under 38 U.S.C. § 5107(a), which is the very cornerstone of the veterans benefits system. *See Hayre* at 1331.

Basic entitlement to service connection for disability benefits under 38 U.S.C. §§ 1110 and 1131, requires that the evidence show only a factual basis that he or she has a disability which resulted from a personal injury or disease incurred during active service, not conclusive "proof". The provisions of 38 U.S.C. § 5107(a) clearly contemplate "consideration" of both "positive and negative" evidence as well as a mandate that "reasonable doubt be resolved in the veteran's favor." If a veteran, in order to bring a well-grounded claim, must provide medical evidence that a current disability is the result of a

disease or injury incurred during active service, the veteran is thus required to prove basic entitlement to service connection, and the intent of Congress is clearly subverted. This holding, found in *Grottveit, Caluza* and *Epps*, represents a definition of well grounded which is entirely inconsistent with the CAVC's prior definition in *Murphy* as well as the plain language of 38 U.S.C. § 5107(a), which held that a well-grounded claim is a claim which is ***either*** meritorious on its own, ***or*** "capable of substantiation."

Consequently, Appellant contends that the CAVC's holdings in *Grottveit, Caluza* and *Epps* diminish the VA's duty to assist to such an extent that it becomes nothing more than a hollow and superficial obligation. If a veteran has provided sufficient medical evidence of the medical nexus between an existing disability and an in service disease or injury, then there is nothing more for the VA to do in terms of development of evidence, and the "duty to assist" is rendered meaningless. Pursuant to 38 C.F.R. § 3.103(a), the VA has a duty to develop the facts pertinent to a veteran's claim and to grant every benefit supported by law. Under the *Grottveit/Caluza/Epps* requirements, once a veteran has submitted the required proof of each element necessary to establish entitlement to service connection under either 38 U.S.C. §§ 1110 or 1131, the VA must grant the veteran's claim and award benefits.

Consequently, Appellant argues that a clear conflict exists between the CAVC's earlier precedent in *Murphy*, and its more recent case law in *Grottveit, Caluza* and *Epps*, which represents a clear question of statutory interpretation which this Court must consider, en banc, and resolve

in a manner which is consistent with the proper interpretation of 38 U.S.C. § 5107(a) and the underlying statutory scheme of veterans benefits. Appellant further argues the CAVC's holdings in *Gottveit, Caluza* and *Epps* have imposed a burden upon veterans which is wholly inconsistent with the non-adversarial, paternalistic and pro-claimant entitlement system intended by Congress. Accordingly, the Appellant contends that this Court should, en banc, adopt the CAVC's holding in *Murphy*, as the correct definition of a well-grounded claim, reflecting an interpretation of 38 U.S.C. § 5107(a) which is more consistent with the underlying intent of Congress than the "requirements" of full substantiation imposed by *Grottveit, Caluza* and *Epps*.

Finally, Appellant argues that the Federal Circuit's opinion in *Epps v. Gober*, 126 F.3d 1464 (1997) must be corrected in part as regards the definition of a well-grounded claim which triggers the duty to assist. In *Epps*, the Panel considered the sole question as to whether the VA's duty to assist a veteran in developing the facts of his or her claim, existed independent of the veteran's burden of fling a well-grounded claim. As part and parcel of that decision, this Court adopted, without due consideration, the definition of a well-grounded claim as created by the CAVC in its opinion in *Caluza*. *Epps*, 126 F.3d at 1468. However, the question of the CAVC's definition of a well-grounded claim under 38 U.S.C. § 5107(a) was not specifically considered by the Panel in that case. Rather, this Court's statement appears to amount to no more than an adoption of the CAVC's definition of a well-grounded claim as that definition was recited in the appealed decision. Accordingly, the Panel's adoption of the CAVC's

definition of a well-grounded claim in *Epps* is tangential and is not precedential. The *Grottveit/Caluza/Epps* definition of a well-grounded claim adopted by the *Epps* Panel, was not in any way necessary to that Panel's actual holding, and thus appears to consist of no more than dicta. Blacks Law Dictionary defines "dicta" as "[e]xpression in court's opinion which go beyond the facts before court, and therefore are individual views of author of opinion and not binding in subsequent cases." *Blacks Law Dictionary*, 408 (5th ed. 1979).

The holding in *Epps* was that a well-grounded claim is necessary to trigger the duty to assist. The Appellant does not seek to overrule that holding, but seeks instead to overrule the expansive definition of well groundedness found in *Grottveit*, *Caluza*, and *Epps*, and seeks affirmation from this Court of the CAVC's "original" definition, in *Murphy*, of "capable of substantiation" as the definition of a "plausible claim". This necessarily involves an interpretation of 38 U.S.C. § 5107(a) as to the definition of a well-grounded claim, but not as to whether a well-grounded claim triggers the duty to assist. Accordingly, the Appellant asks that this Court to resolve the clear contradiction in the definition and the requirements imposed upon a veteran by the CAVC case law discussed

above, in favor of the CAVC's definition of a well-grounded claim as setout in *Murphy*.

Dated: November 11, 1999

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and fifteen copies of the above and foregoing document has been shipped by overnight delivery to the Clerk and two copies to the below named counsel for Appellee on the 11th day of November, 1999, addressed to:

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